

Bricklayers, Masons & Plasterers International Union of America, Local Union No. 5, AFL-CIO and Childers Construction Company and Bournes, Coleman, Hale Construction,<sup>1</sup> Inc. and United Brotherhood of Carpenters and Joiners of America, Local 302, AFL-CIO. Case 9-CD-418

30 September 1983

## DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN DOTSON AND MEMBERS  
ZIMMERMAN AND HUNTER

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following charges filed by Childers Construction Company (Childers), alleging that Bricklayers, Masons & Plasterers International Union of America, Local Union No. 5, AFL-CIO (Bricklayers), violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring Bournes, Coleman, Hale Construction, Inc. (the Employer), to assign certain work to employees represented by Bricklayers rather than to employees represented by United Brotherhood of Carpenters and Joiners of America, Local 302, AFL-CIO (Carpenters).

Pursuant to notice, a hearing was held before Hearing Officer Richard F. Czubaj on 9 March 1983 at Huntington, West Virginia. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, Childers and the Employer jointly filed a brief and Bricklayers and Carpenters each filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the rulings made by the Hearing Officer and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

### I. THE BUSINESS OF THE EMPLOYER

The parties stipulated, and we find, that the Employer is a West Virginia corporation engaged as a contractor predominantly doing masonry work. During the 12 months preceding the hearing, the Employer performed services valued in excess of \$50,000 in States other than the State of West Virginia. Accordingly, we find the Employer is engaged in commerce within the meaning of Section

2(6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

### II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that Bricklayers and Carpenters are labor organizations within the meaning of Section 2(5) of the Act.

### III. THE DISPUTE

#### A. Background and Facts of the Dispute

The Employer is a subcontractor engaged in performing masonry work on six residential townhouses in West Williamson, West Virginia, pursuant to a contract with Childers, the general contractor on the project. Prior to the West Williamson project, the Employer had performed masonry work on a commercial project using employees represented by Bricklayers and had signed a collective-bargaining agreement with Bricklayers which was effective at all times material herein. The Employer also signed a residential agreement with Carpenters before entering into its contract with Childers. The Carpenters residential agreement provided, *inter alia*, that Carpenters should have jurisdiction over all the work on a residential project and provided for different wages and work rules from those contained in its commercial collective-bargaining agreements. Notwithstanding the jurisdictional clause in the Carpenters residential agreement, the Carpenters business agent testified that Carpenters would waive its jurisdictional claim to the work in dispute if Bricklayers signed a residential agreement similar to that of Carpenters.

Subsequent to signing the Carpenters residential agreement but prior to entering into its contract with Childers, the Employer approached Bricklayers and asked whether it would enter into a residential agreement similar to that of the Carpenters. The Bricklayers business agent took the matter to a membership meeting and subsequently informed the Employer that the membership had voted to reject the Employer's request. Thereafter, the Employer signed a contract with Childers to perform the masonry work on the six-townhouse project, told its employees that they would be working under the Carpenters residential agreement, and began work on the project. After the Employer started work on the project, Bricklayers picketed the project site for the purpose, as admitted by the Bricklayers business agent, of "getting the work."

#### B. The Work in Dispute

The work in dispute is the installation of all concrete block and brick work at the Employer's job-

<sup>1</sup> The name of the Employer appears as amended at the hearing.

site at Sixth Avenue and Gum Street, West Williamson, West Virginia.

### C. *The Contentions of the Parties*

The Employer and Childers contend that the work in dispute should be awarded to employees represented by Carpenters based on the collective-bargaining agreement, the Employer's preference, employer and area practice, and economy and efficiency of operations. Bricklayers contends that the work in dispute should be awarded to employees represented by it based on the collective-bargaining agreements, the Employer's preference, employer and area practice, relative skills, and economy and efficiency of operations.

### D. *Applicability of the Statute*

Before the Board may proceed with a determination of dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

As noted above, after the Employer assigned the work in dispute to Carpenters, Bricklayers picketed, and the Bricklayers business agent admitted that the picketing was for the purpose of obtaining the work in dispute. Furthermore, all parties stipulated that Bricklayers picketing was "by virtue of claiming" the work in dispute. Based on the foregoing, and on the record as a whole, we find that reasonable cause exists to believe that an object of the picketing was to force or require the Employer to assign the work in dispute to employees represented by Bricklayers in violation of Section 8(b)(4)(D).

No party contends, and the record discloses no evidence showing, that an agreed-upon method for the voluntary adjustment of the instant dispute exists. Accordingly, we find that the dispute is properly before the Board for determination under Section 10(k) of the Act.

### E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.<sup>2</sup> The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.<sup>3</sup>

<sup>2</sup> *NLRB v. Electrical Workers Local 1212 [Columbia Broadcasting System]*, 364 U.S. 573 (1961).

<sup>3</sup> *Machinists Lodge 1743 (J. A. Jones Construction Co.)*, 135 NLRB 1402 (1962).

### 1. *Certifications and collective-bargaining agreements*

Neither of the Unions involved has been certified by the Board as the collective-bargaining representative for a unit of the Employer's employees. Both Carpenters and Bricklayers had collective-bargaining agreements with the Employer which were in effect during all times material herein. The Bricklayers agreement, which is not by its terms limited to commercial projects, provides that Bricklayers is the exclusive representative of employees in classifications covered by that agreement, including bricklayer and stone mason—classifications which would appear to encompass the work in dispute. The Carpenters agreement by its terms covers all work done on residential projects, including, *inter alia*, townhouses, and therefore this agreement is sufficient to encompass the work in dispute. Since both agreements arguably encompass the work in dispute, and since neither Union is certified, these factors are not helpful in the determination of this dispute.

### 2. *Economy and efficiency of operations*

The Employer's president testified that employees represented by Carpenters could lay block and brick, run equipment, and perform carpentry work, and that this flexibility resulted in an efficient use of manpower on the project. He further testified that the Employer's agreement with Carpenters contains less restrictive work rules than those in the Bricklayers agreement and that therefore the assignment of the work in dispute to employees represented by Carpenters results in greater economy than would an award to employees represented by Bricklayers.

Bricklayers did not show that employees represented by it could perform work other than laying block and brick, or that an award of the disputed work to employees represented by it would be as economical as the Employer's assignment. Accordingly, we find that the factor of economy and efficiency of operations favors an award of the work in dispute to employees represented by Carpenters.

### 3. *Relative skills*

The record shows that employees represented by each of the Unions possess the requisite skills to perform the work in dispute. We therefore find this factor is inconclusive.

### 4. *Employer preference*

The Employer expressed its preference that its employees represented by Carpenters continue to perform the work in dispute because it has been

satisfied with their performance. Accordingly, although not entitled to controlling weight, this factor favors an award of the work in dispute to employees represented by Carpenters.

#### 5. Employer and area practice

The record discloses that the Employer when performing residential masonry work in the past generally has utilized nonunion employees. The record further reveals that, although the Employer and other contractors in the area have utilized employees represented by Bricklayers to perform a large part of the commercial masonry work in the area, almost all residential masonry work in the area is performed by nonunion employees. Accordingly, these factors are not helpful in determining this dispute.

#### Conclusion

Upon the record as a whole, and after full consideration of all the relevant factors involved, we conclude that the employees who are represented by Carpenters are entitled to perform the work in dispute. We reach this conclusion based on the factors of economy and efficiency of operations and the Employer's preference, and the fact that the employees represented by Carpenters possess the requisite skills to perform the disputed work and that such an award is not inconsistent with the Employer's collective-bargaining agreements. In making this determination, we are awarding the work in dispute to the employees who are represented by Carpenters, but not to that Union or its

members. The present determination is limited to the particular controversy which gave rise to this proceeding.

#### DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees of Bournes, Coleman, Hale Construction, Inc., who are represented by United Brotherhood of Carpenters and Joiners of America, Local 302, AFL-CIO, are entitled to perform the installation of all concrete block and brick work at the Employer's jobsite at Sixth Avenue and Gum street, West Williamson, West Virginia.

2. Bricklayers, Masons & Plasterers International Union of America, Local Union No. 5, AFL-CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Bournes, Coleman, Hale Construction, Inc., to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, Bricklayers, Masons & Plasterers International Union of America, Local Union No. 5, AFL-CIO, shall notify the Regional Director for Region 9, in writing, whether or not it will refrain from forcing or requiring Bournes, Coleman, Hale Construction, Inc., by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.